**JD(ATL)–25–06**
**Charlotte, NC**

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**ATLANTA BRANCH OFFICE**

**SHEPARD EXPOSITION SERVICES, INC.,**

**and** **CASE 11–CA–20858**

**INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISITS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, AFL-CIO-CLC**

**FREEMAN DECORATING COMPANY**

**and** **CASE 11–CA–20859**

**INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, AFL-CIO-CLC**

***Shannon R. Meares, Esq.*** and ***Jane P. North*** **Esq**., for the General Counsel.
***Lesley A. Troope, Esq***. for Charging Party Union.
***J. Roy Weathersby, Esq., James W. Wimberly, Jr. Esq.,*** and ***Chris Caiaccio, Esq.***, for Respondents.

## DECISION

### Statement of the Case

**MARGARET G. BRAKEBUSCH, Administrative Law Judge**. This case was tried in Charlotte, North Carolina, on February 22, 23, and 24, and on March 27, 2006. The charges in Case 11-CA-20858 and 11-CA-20859 were filed by International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL-CIO-CLC, herein the Union, on August 24, 2005. The Union filed amended charges on October 28, 2005, second amended charges on November 18, 2005,

and third amended charges on November 30, 2005. Based upon the allegations contained in these charges, the Regional Director for Region 11 of the National Labor Relations Board, herein the Board, issued an Order Consolidating Cases, Complaint and Notice of Hearing on November 30, 2005.

The complaint alleges that commencing on or about February 24, 2005, Shepard Exposition Services, Inc., herein Shepard,[1] and Freeman Decorating Service, herein Freeman,[2] refused to bargain with the Union as the collective bargaining representative of certain employees who are employed by Shepard and Freeman on a per diem or casual basis. The complaint further alleges that on or about June 13, 2005 and August 11, 2005, and continuing thereafter, Shepard withdrew recognition from the Union and continuing thereafter, has failed and refused to negotiate a successor collective bargaining agreement.

The complaint also alleges that since February 24, 2005, and continuing thereafter, Freeman has failed and refused to use the Union's exclusive referral hall as provided in the parties' collective bargaining agreement and since on or about June 17, 2005, Freeman has failed and refused to meet, confer, and bargain with the Union. Finally, the complaint alleges that on or about June 17, 2005, and continuing thereafter, Freeman withdrew recognition from the Union as the exclusive bargaining representative of certain employees employed by Freeman on a per diem or casual basis. The Respondents filed their answers to the complaint on January 11, 2006.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel, the Union, and the Respondents, I make the following:

## Findings of Fact

### I. Jurisdiction

Shepard, a Georgia corporation, with an office and place of business in Charlotte, North Carolina, is engaged in the business of performing contracting services for the

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1 When reference is made to both Shepard and Freeman, the collective term Respondents is used in this decision text.

2 When reference is made to both Freeman and Shepard, the collective term Respondents is used in the text of this decision.

3 The hearing in this matter began on February 22, 2006 and continued through February 24, 2006. The hearing resumed on March 27, 2006. On March 16, 2006, and after the General Counsel and the Union presented their cases in chief, Respondents filed motions to amend their answers to the complaint to include two additional affirmative defenses. Specifically, the Respondents sought to assert an affirmative defense that the Union committed a material breach of its collective bargaining agreement with Respondents when it completely discontinued the referral hall process. Respondents also sought to add the affirmative defense that the Union attempted to transfer representational rights to Local 322 in absence of adequate due process safeguards such as an affiliation vote among union members. The motions to amend the answer were opposed by both the General Counsel and the Union. Pursuant to Section 102.23 of the Board's Rules and Regulations, Respondents' motions were denied.

convention service industry, including installing, maintaining, and dismantling displays and exhibits. Annually, Shepard purchases and receives at its Charlotte, North Carolina facility goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. Shepard admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Freeman, a Texas corporation, with an office in Atlanta, Georgia, has been engaged in the business of performing contracting services for the convention service industry, including installing, maintaining, and dismantling displays and exhibits for various entities in Charlotte, North Carolina. Annually, Freeman purchases and receives at its Atlanta, Georgia office, goods and materials valued in excess of $50,000 directly from points outside the State of Georgia. Freeman admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Shepard and Freeman admit, and I find that the Union is a labor organization within the meaning of Section of 2(5) of the Act.

## II. Alleged Unfair Labor Practices

### A. Issues

Neither Freeman nor Shepard deny that in approximately mid-2004, they began to operate entirely non-union, without regard to their respective collective bargaining agreements with the Union. Counsel for the General Counsel submits that the primary issue in this case is whether Shepard and Freeman breached their obligation to recognize and bargain with the Union. The Union maintains that Shepard and Freeman seized upon "co-bargaining agent-union IASTSE Local 837's temporary, foreseen inability to provide referral hall labor" as a basis for attempting to terminate their "surviving, respective Section 9(a) bargaining relationship with the International Union. Shepard and Freeman maintain, however, that their actions were lawful and they assert a number of defenses in support of their position. Shepard and Freeman assert that since the summer of 2004, the Union was aware of their having operated in total violation of their collective bargaining agreements, and yet took no action prior to writing Respondents on June 9, 2005. The Respondents asserts that because of the Union's knowledge of their failure to follow the collective bargaining agreements, the complaint is barred by Section 10(b) of the Act. Respondents further contend that the principles of defunctness, equitable estoppel, disclaimer of interest, and repudiation, which includes material breach, serve as complete defenses to all the allegations of the complaint. Respondents also maintain that the Union has never established a majority status among the new workforce used by the Respondents.

### B. Background

Freeman and Shepard provide trade show and special event convention services in Charlotte and throughout the United States and their work primarily involves installing and dismantling trade shows and convention events for vendors. Louis Anderson Walston, III, herein Walston, is the General Manager for Freeman's Atlanta Branch office. Richard Mathew Delarber, herein Delarber, is Shepard's Regional Vice President. Delarber previously served as the General Manager for Shepard's Charlotte branch operation.

William Gears, Jr., herein Gearns, is an International Representative and Trade Show Director for the Union; which is a conglomerate of craft locals. Faye Harper, herein Harper,

has been an International Representative for the Union for thirteen years. She has also held the position of Business Representative for Union Local 834 in Atlanta for seven years. In 2003 and a part of 2004, Johnny Harris served as the call steward for Union Local 837 in Charlotte, North Carolina.

Gearns testified that the status of the trade show industry varies by market. He opined that the industry is just now recovering to its status prior to September 11, 2001. Individuals employed in the trade show industry are not guaranteed daily work because of the sporadic nature of the industry. Both Shepherd and Freeman have bargaining relationships with the Union for work performed outside Charlotte.

### C. The Union's Representational Activities in Charlotte

In late 1999 and early 2000, Gearns and Harper were assigned by the International to investigate the trade show work performed by Union Local 322; the stage hand local in Charlotte, North Carolina. At that time, all employees performing trade show work in the Charlotte area were referred through Local 322, whose jurisdiction was stage craft. While Local 322 primarily serviced the theatres and amphitheatres, they also provided employees to trade show contractors for specific events and trade shows coming into Charlotte. As a result of the investigation, the Union's International President and Executive Board decided to issue a separate charter[4] for a new local to represent only trade show employees in the Charlotte market.

Gearns testified that Local 837 was chartered by the Union to not only stabilize the work force in Charlotte, but to also aggressively obtain trade show work and 9(a) collective bargaining benefits for their members in that industry. He explained that a hiring hall benefits employees in the industry by enabling them to work for more than one employer and obtain benefits through the multi-employer benefit fund. Gearns explained that employers opt to negotiate referral hall arrangements with the Union in order to have a labor pool to draw upon when needed. Because employers only have a sporadic need for a number of skilled workers, it is difficult for them to maintain their own work force. He confirmed that the main selling point for the Union with an employer is the supply of good labor.

When Local 837 was chartered, Harper, as the assigned International Representative, registered with the Department of Labor and arranged for telephone and office space. Harper set up an office for Local 837 in the same building as Local 322. The office contained a desk, filing cabinet, fax, and telephone. Only Harper and Johnny Harris; Local 837's call steward, had keys to the office. Harper also contacted Local 322 members and advised them as to how they could join Local 837 and have their names added to the 837 referral list. While the membership of Local 837 was built from Local 322's membership, individuals on the Local 837's referral list were not required to be Union members.

Prior to the chartering of Local 837, Local 322 referred their members to both Shepard and Freeman for trade show work. While both Freeman and Shepard obtained labor through Local 322, the employees' pay was based upon a rate sheet rather than a collective bargaining agreement. The rate sheets included the applicable wage rates of employees without any requirement for the employer to pay any other fringe benefits.

[4] When a charter is issued for a local union, it has a specific craft or work jurisdiction and the local can only organize or represent employees in that craft.

Shepard and Freeman also used their own employees for some of the trade show work. Gearns testified that he was unaware that either Freeman or Shepard had full-time employees who did only show site work.

In 2000, the Union successfully organized employees working for both Shepard and Freeman. While both Shepard and Freeman declined to voluntarily recognize Local 837, Harper was unaware of any attempts by Shepard or Freeman to prevent the Union's organizing efforts. Local 837 was certified as the collective bargaining representative of the part-time, per diem, or casual employees performing the trade show work for the two employers. The International was not certified as the collective bargaining representative of the employees in the bargaining unit. The Local was certified as the collective bargaining representative for the bargaining unit employees employed by Freeman on July 13, 2000. Local 837 was certified as the collective bargaining representative for Shepard's bargaining unit employees on July 19, 2000.

Both Shepard and Freeman entered into collective bargaining agreements with the Union. The negotiated bargaining units included all employees employed by the respective Respondents on a part-time, per-diem, or casual basis in exhibition, display work, decorating, carpet laying, floor marking, sign hanging, pipe and drape, installation and dismantling, sign rigging, steel and chain motor rigging, unloading and loading trucks and general labor.

The negotiations for a collective bargaining agreement with Shepard were conducted at Shepard's warehouse in Charlotte and the agreement was executed on October 30, 2001. Gearns and Harper participated in the negotiations as representatives of the International. Bargaining unit member Mark Basic and Acting Business Agent Bruce Greear represented Local 837 during the Shepard negations. Delarber represented Shepard during the negotiations. The preamble of the collective bargaining agreement provides that the agreement was made and entered into between the International and its Local 837 and Shepard. Harper testified that the International was the co-bargaining agent for the negotiations.

During negotiations with Shepard, the Union requested that Local 837 employees who had also worked through Local 322 be classified at the journeyman pay classification. Shepard agreed. Harper recalled that during negotiations, Delarber also raised concerns about whether the Union would be able to fill Shepard's labor calls and whether employees would bring tools and remain on the job for the duration of the call. To address Shepard's concerns, a provision was added to the agreement specifying the mandatory tools for employees to bring to the jobs. To cover Shepard's concerns that the Union might not be able to meet the number of employees needed for a job call or in the event that employees did not remain on the job for the duration of the call, Article 2.09 was included in the agreement. Article 2.09 provides: "The parties understand the Employers may establish a list of 20 employees to perform work normally performed by members of the bargaining unit." Article 5.03 of the agreement provides that in the event that the Union cannot meet all the employer's requirements, the Union must notify the employer by fax within 48 hours prior to the reporting time for the call and state who is on the call. In such an event, the employer is entitled to obtain labor to complete the call from other sources of the employer's choosing. The employer is only allowed to fill the call with the number of employees the Union could not supply and to provide notification to the Union. Harper clarified, however, that while Shepard could use 20 non-bargaining unit employees on a job, the employer could only provide five non-bargaining employees initially. The contract provides that should more than five employees be required on any call or job, the company would request two workers from the

Union for each of the additional employees required on the call up to a maximum of 15.

The Union and Freeman conducted negotiations at the Firefighter's Hall in Charlotte and the collective bargaining agreement was executed on March 28, 2002. The preamble reflects that the agreement was made and entered into between Freeman and the International and its Local 837. Freeman's General Manager Walston signed the contract on behalf of Freeman. Harper signed on behalf of the Local and the Union's International President signed on behalf of the International. Only Harper and the Union's attorney participated in the negotiations on behalf of the Union. Walston explained that he and Harper used the parties' Atlanta contract as a blueprint for the Charlotte contract. He estimated that 95% of the contract was identical to the terms and conditions in the Atlanta contract. He testified that his main objective in entering into a contract with the Union was his desire to have a consistency between the Atlanta terms and conditions of employment and the Charlotte terms and conditions of employment. Freeman was also interested in having a reliable and stable means of obtaining workers for its Charlotte work. Harper maintained that the International participated as a co-bargaining agent and that the International is co-bargaining agent to all collective bargaining agreements. Although the contract was not completed until March 2002, Local 837 provided labor to Freeman during the interim between July 2000 and March 2002. During the interim, the parties worked from a "Run of the Show" contract; a mini template of a collective bargaining agreement. Harper explained that the "mini contract " sets out the employee wages for regular time and overtime as well as the specific dates of service and the agreed-upon meal periods and employee breaks.

During negotiations, Walston raised many of the same concerns that Delarber had raised during the Shepard negotiations. Harper testified that specific provisions of the agreement were added to the collective bargaining agreement to address the Freeman's concerns. Section 2.09 of the Freeman collective bargaining agreement provides:

> Due to this Employer's recent entry into the Charlotte trade show market and the relative newness of the Union's hiring hall, the parties understand the Employer may bring in up to 20 company employees from out-of-town locations to perform bargaining unit work. Upon request, the Employer shall provide to the Union a list of such company employees, showing name, address, and social security number.

Section 2.091 further provides:

> Should more than five out-of-town company employees be utilized on any job, the company will request two referrals from the Union for each of the additional company employees employed on the job call up to a maximum of 15 employees.

Based upon this contract provision, Harper explained that Freeman, just as Shepard, could not just send in 20 employees to the job without the Union's participation for labor calls. Section 5.02 also provides that Freeman would be entitled to obtain labor to complete the call from other sources of Freeman's choosing if the Union gives notice that it cannot fill the call.

### D. Local 837's Referral of Employees to the Respondents

Harper testified that when she visited Charlotte she used the space that was rented for Local 837's office, however, she did not know whether the Local's call steward used the space at any time. She asserted that the referral hall participants never used the space because they would not have been aware that the Union had the Charlotte office space. When the Union held membership meetings, the meetings were conducted at the Charlotte Firefighters Hall. Harper testified that she was not aware that representatives from either Shepard or Freeman ever visited Local 837's Charlotte office. Call Steward Harris was also unaware that the Local's office telephone was ever used for requesting labor calls. Neither Freeman nor Shepard presented any witnesses to confirm that they had ever telephoned or visited Local 837's Charlotte office.

When Local 837 was chartered, it was expected that it would achieve autonomy as a Local. Local 837 did not, however, achieve autonomy and no Local officers were ever elected. No one other than Bruce Greear was designated by the International as acting business agent. Because there were no officers or designated business agent, both Freeman and Shepard were informed during negotiations that Harper was the designated contact person for the Union.

Harper testified that when either Freeman or Shepard needed employees for an event or show, the labor call requests were either faxed to her at her home or to the office of Local 834 in Atlanta. Requests for labor calls were also made to her via her cellular telephone. Harper testified that she was unaware that any labor call requests were ever telephoned or faxed to the Local's office in Charlotte. After receiving a labor call request, Harper forwarded the request to the call steward in Charlotte. A call steward is the individual who actually contacts the employees on the referral list and directs them to the employer for the specific job. Bruce Greear served as call steward for the Local in 2001 and Mark Basic served as call steward in 2002. In 2003, the call steward function was held by Johnny Harris. Harper acknowledged that both she and Harris served as call stewards in 2004. Harper confirmed that generally when she received labor calls from Shepard and Freeman for work in the Charlotte area, the employers were looking for approximately 15 to 20 employees. A high labor call request would have been 30 to 35 employees.

There is neither a requirement for employees to accept labor calls nor is there a penalty if employees decline work. Once the call steward contacted the employees for the labor call, he faxed the names of the employees to Harper. She, in turn, prepared a list and forwarded to the employer the names of the employees who were scheduled to report for the specific job. After the completion of the job, the Union's job steward for that particular job call mailed a steward's report to Harper. The report contained the names of the referrals who worked the job and their hours worked. The employees who reported for the jobs were not paid directly by the Respondents. The contracts required the Respondents to mail the employees' paychecks to Harper along with accounting reports. The accounting reports identified all the employees who had worked during the previous payroll period as well as the amount of regular, overtime, or double time hours worked. Under the terms of the contracts, Respondents were obligated to submit health and welfare and annuity fund contributions as well as referral fees to the Union on a monthly basis. In reviewing the payroll and reports, Harper determined if there was any pay discrepancy and verified the hours for the necessary health and welfare and annuity contributions. The Respondents also deducted the referral fee for Local 837 from the employees' checks. There is no dispute that employees' paychecks and the above-described reports were always sent to Harris at her home or at the

office of Local 834 in Atlanta. At the end of each show or event, the stewards also mailed a steward's report to Harper in Atlanta. The report contained a log of when employees signed in and out for work each day. The log also reflects when the employees signed out for lunch breaks as well as the total hours that they worked each day.

### E. Johnny Harris' Role in Local 837

Harper testified that when a local has autonomy, the business agent may serve as the call steward or the business agent may hire a call steward. During the time that Bruce Greear served as call steward, he was paid because he was also the acting business agent. Mark Basic was not paid for his services as a call steward. Harper testified that when Local 837 had work and was making referrals, Harris was paid $200 per month. Harris was also compensated by his assignment as a job steward on the work calls. When Harper provided an affidavit to the Board during the investigation of the charges, she described Harris's title as Administrative Assistant and did not reference him as a call steward. She further referred to Harris as a "mere employee" of the Local.

Harris acknowledged that during the time that Harris was working for the Local, he may have assigned one or two job stewards and he had also forwarded grievances to her.

### F. The Union's Ability to Fill the Labor Calls Under the Collective Bargaining Agreements

Harper testified that there had been some occasions prior to May 2004 when the Local was unable to fill labor calls for Shepard and Freeman. She asserted, however, that neither Shepard nor Freeman ever complained about the Union's inability to fill labor calls. On cross examination, she acknowledged, however, that when she earlier provided a sworn statement to the Board, she had contended that prior to May 2004, there had never been a time when the Union could not fill labor calls for Shepard.

Walston testified that in the winter of 2003, the labor calls to the Union were "flowing pretty well." He also recalled, however, that the Union consistently missed their numbers and Freeman often had to supplement the labor from other sources. Walston and Harper discussed the referral problems just as they had discussed the matter when they had encountered similar problems with the Atlanta market.

Harper recalled that there was a decrease in work from approximately November 2003 until February 2004. Harper asserted that this lack of work did not concern the Union because the work in Charlotte had always been sporadic. Harper testified that the Union received labor calls in March and April 2004 and was able to fill the calls. Harper explained that "filling a call" means that the Union is able to provide the full number of employees requested by an employer. In April 2004, Harris resigned as call steward for Local 837. Harper sent no notice to Local 837 members or referral hall participants and no notice to either Shepard or Freeman concerning Harris' resignation.

Harper testified that she scheduled a trip to Charlotte in May 2004 to close the Local 837 office. Harris volunteered, however, to close out the office and ship the referral information to her home in Atlanta. She asserted that despite Harris' promise, he never sent her all of the referral records. The telephone was disconnected and the calls were

forwarded[5] to her cellular phone. Harper testified that she did not notify either Freeman or Shepard in May 2004 when she closed the office and forwarded the telephone service to her cellular telephone. Additionally, she did not notify any of the Local 837 members or referral participants. She testified that during the time that Harris had been involved in the referral hall for Local 837, he had used one of the Union cellular phones. Harper asserted that when Harper did not return the cell phone to her, she discontinued the telephone service.

Harris testified that in either January or February 2004, Harper instructed him to empty the Local's office because there was no money left in Local 837's account to pay rent. He recalled that at the time, the Union was in arrears in his backpay and business expenses. Later in March, Harris told Harper that he wanted to return the Union cellular phone and to resign from Local 837. Harris recalled that around March 2004, he began having increasing problems with getting employees to fill calls. He explained that he had previously solicited members to sign union cards. He asserted that even though the individuals submitted their membership fees, Harper did not provide them with cards. Harris recalled that these individuals continued to call him to inquire as to the status of their membership and the status of the Local. Eventually, these individuals refused to work for Local 837 until they received their cards. Harris identified five of the individuals who had not received their union cards.

### G. Harris' Description of his Work for Local 837

Harris has been involved in trade show work in Charlotte for approximately 15 to 20 years. In approximately 1992 or 1993, he became a member of Local 322 in Charlotte. Harris became a charter member of Local 837 in April 2000. His involvement with Local 837 continued until March 2004. Harris testified that sometime in 2002, he was given complete control for making the labor calls for Local 837. Harris was given a fax machine, the Union cellular telephone, keys to the Local's office in Charlotte, and responsibility for the steward reports.

Harris explained that while he initially served as only a call steward, his duties were later expanded. In addition to soliciting new employers for work, Harper also authorized him to contact employers concerning untimely payroll checks. He recalled that Harper told him that he could call clients concerning their pay delinquency, as long as he remained polite. He estimated that he made these calls to employers as often as once or twice every month or two months. As a part of soliciting new business, he recalled that in 2003 he took copies of the Union's contracts with Shepard and Freeman to George Fern; another large decorating company in Charlotte. During his testimony, Harris also identified a contract between Local 837 and Trade Resources, Inc. The contract, covering a trade show from March 10, 2003 to March 17, 2003, was signed by Harper on behalf of the International and Harris on behalf of the Local. Harris' name and title was identified as administrative assistant. Harris testified that he had initiated the contract by his contact with the employer. Harris also identified the Union's contract with another employer identified as Youth Specialties for an October 27, 2003 show. The contract was signed by the employer and only by Harris on behalf of the Union. He testified that he did so at the direction of Harper.

Harris estimated that during the time that he solicited new business for the Union, he may have contacted twenty or thirty employers. Harris testified that with the permission of

[5] The phone line remained operational until 2005 with all calls forwarded to Harper's Atlanta telephone.

Harper, he created business cards identifying him as the Local's administrative assistant. While he did not identify a time period, Harris identified a brochure concerning Local 837's ability to provide exhibition and display specialists for Charlotte. Harris was identified in the brochure as "Business Administrator" and his Charlotte cell phone number, home telephone number, and fax numbers were listed. Harris asserted that the brochure had been faxed to Harper in Atlanta and she had approved its distribution. Harris explained that he gradually changed his title from "Administrative Assistant" to "Business Administrator." Toward the end of the time that he worked with the Local, he even began introducing himself as "Business Representative." He explained that with Harper's permission, he appointed a temporary executive board for the Local. Using a sample constitution provided by Gearns, Harris and the executive board met to draft the Local's constitution and by-laws. The documents, however, were never completed.

### H. Harris's Work after Resigning from the Local

Harris testified that after resigning from the Local, he maintained his contacts with the individuals working in the convention industry. From his contacts he learned that Shepard and other employers were having difficulty getting employees. He recalled that during a period from April to September 2004, he spoke with individuals from both Shepard and Freeman and told them about the closing of the Local's office and his return of the Union cellular telephone. He recalled that he spoke with Cindy Hester of Shepard as well as Jeff Giles and Michael DeBord with Freeman.

In September 2004, Harris began operating his own labor referral company in Charlotte. He estimated, however, that 90 percent of his work is outside the Charlotte area. Since September 2004, he has provided equipment and labor referrals to both Shepard and Freeman. While there is no provision for the employees to participate in the Union's health and welfare plan, he has obtained wages that he describes as "somewhat comparable" to the Union wages and he has provided a training program for his employees. He estimated that twenty percent of his work is performed for Shepard and five percent is performed for Freeman.

As of January or February 2005, Harris signed a contract with Freeman. The contract has no expiration date and provides for Freeman's termination without any liability or expense. Harris does not have a contract with Shepard.

### I. Harper's Contact with Shepard after April 2004

Bob Chapman functions as Shepard's Sales Manager and On-Site Operations Manager for Charlotte. He is involved in determining the labor needs for Shepard prior to any Charlotte event. He estimated that Shepard handled approximately 70 events in Charlotte in 2004 and approximately 35 events in the first half of 2005. Chapman recalled that in March 2004, Shepard placed a labor call to the Union for 15 men and only seven men responded to the call. He also recalled that in the latter part of March 2004, Shepard contacted Harper for a five-man labor call. Harper telephoned Chapman and reported that the Union could only fill three people for the call. Harper told Chapman that she was having difficulties filling the call because the individuals on the referral list were not returning her calls. Chapman testified that for the months following March, the Union continued to have difficulty in filling Shepard's labor calls.

In May 2004, Shepard placed a labor call for 10 employees and Harper was able to

provide only four employees. Harper recalled that she was able to arrange for the four employees by working from an old call list in her possession and a partial list that Harris had provided to her. While she placed a number of calls and left messages, many of the employees failed to return her call. She also found that she did not have the correct number for many of the individuals. Harper telephoned Delarber and explained that she was only able to provide four employees for the job. She told Delarber about her difficulty in getting employees to fill the call. She also told him that she was going to file a report with the International about the problems in Charlotte. She opined that the International would probably decide that Local 837 would go back into Local 322. During the conversation, Delarber told her that Shepard had another trade show coming up and he would need a large number of employees. Harper recalled telling Delarber: "You just gave me a ten person call, you know go ahead and do what you need to do to fill your upcoming call because I'm not going to be able to fill it." Harper acknowledged that it was during this last labor call from Delarber that Delarber told her about Harris starting his own business. Harper admitted that in additional to Delarber, many of her own union members also told her about Harris' new business. She also admitted that "it had crossed her mind" that Harris was providing referrals to Shepard and Freeman.

Harper confirmed that during June, July, and August of 2004, she received no labor calls from Shepard. While Harper acknowledged that she received some referral fees from Shepard during this time, she received no paychecks for labor calls after May 2004. While she believed that Shepard had violated the contract, she did not file a grievance. She explained that Shepard had come to her for referrals and she had been unable to provide the referrals. She testified: "So I just didn't do anything because I didn't feel that I needed to penalize them for trying to service their clients to get their shows in."

The Union introduced into evidence a letter dated August 1, 2004 from International Vice President Anthony De Paulo to Earl Davis. The letter identified Davis as a Vice President with Shepard and was addressed to Davis at Shepard's Atlanta office. De Paulo informed Davis that the letter served as notification that the agreement between Shepard and the Union would terminate on November 1, 2004. The letter asked that Davis contact the Union to arrange for the first negotiating meeting.

Harper testified that after she received a copy of De Paulo's letter to Davis, Delarber telephone her in late August. She asserted that Delarber asked about the reopener and wanted to set dates for negotiations. She recalled that Delarber mentioned that Shepard Vice-President Cecil Adams might be handling the negations for Shepard. She told Delarber that because she was involved in negotiations for Local 834 in Atlanta, she could not set a date for contract negotiations with Shepard. She also told him that she was still working on the report to the International about the circumstances with Local 837 in Charlotte. She suggested that she would call him back in November and touch base as to setting a date for negotiations. Harper testified that she again spoke with Delarber in November and told him that she was still involved in negotiations and her calendar was still booked. She added that her report on Local 837 would be given to the International in January 2005. She testified that she told him that she thought that the International President would return the jurisdiction to Local 322 and she would call him in January and let him know the outcome of the International's decision.

Delarber testified that Shepard was scheduled to do a large show in Charlotte at the first of November 2004. He explained that because of the Union's previous inability to provide labor for calls, he talked with Harper near the first of October. Delarber testified that

during the conversation, Harper told him the Local's office was closed in Charlotte and the phone and fax lines had been disconnected. When Delarber told Harper about his need for 65 men for the upcoming show, Harper told him that she could not get even one person to return her call for a referral. He testified that she told him that the membership was just not there and she could not place a call with anyone to fill the labor call. Delarber testified that he asked Harper: "Are you saying that it is a waste of my time and yours to call you about any more labor calls? He contended that Harper replied: "yes, it's a waste of your time and mine. This Union no longer exists, there's not one member that will return my calls." Delarber recalled that he ultimately needed 85 people for the November event and none of the individuals came from the Union. He obtained the workers for the event from the company's offices in Charleston, Orlando, and Atlanta. He also brought workers from New Orleans and Gatlinburg. Additionally, Delarber employed workers who were referred by Harris.

Delarber testified that he had been unaware of the International's letter to Davis in August 2004 concerning negotiations for a new contract. Delarber testified, without dispute that as of August 2004, Davis was no longer employed by Shepard. He explained that he had never received the letter and had been surprised to hear of it during Harper's testimony. He also explained that the individual who signed for receipt of the letter was a part-time receptionist at the time of its receipt.

Delarber denied that he had any conversations with Harper in 2004 about negotiating a new labor contract for Charlotte. He asserted that had there been such a conversation, he would have asked her for whom they were negotiating since she had already told him that the Local had closed and there were no members.

### J. Harper's Contact with Freeman after April 2004

After Local 837 was first certified as the representative for Freeman's bargaining unit employees, Michael Bolton became the Director of Operations for Freeman. A part of Bolton's responsibilities was to oversee the labor calls and to make sure that Freeman had the workers they needed to fulfill their trade show contracts. He recalled that during the first quarter of 2004, the Union periodically failed to provide all of workers requested by Freeman and was usually short on filling Freeman's needs for the larger calls.

In 2004, Michael DeBord maintained his office in Atlanta and served as Freeman's Show Site Operations Manager. A part of his job responsibilities was the approval of labor costs for work performed in Charlotte. In March 2004, DeBord visited Charlotte to analyze the efficiency of Freeman's show site operations. While visiting a show site in Charlotte, DeBord met Harris. During the course of meeting with Harris, DeBord learned that Local 837 was shutting down its telephone and fax lines. Harris recalled that during the show, he told Freeman Supervisor Jeff Giles that he was in the process of cleaning out Local 837's office and that he was resigning from the Union. DeBord telephoned Bolton to report what he had learned about the disconnection of the Local's telephone and fax lines.

While he could not provide a date,[6] Bolton testified that in 2004, he telephoned Harper and told her that he had heard that the Local was pulling their telephone and fax lines

[6] Bolton could only recall that the conversation occurred around the time of the Plastic Encounter show in Charlotte.

in Charlotte. Bolton acknowledged that while she did not deny that the Local's office was closing, she did not indicate that the closing of the office would impact the Local's ability to continue to operate. He asked how the Local and Freeman were going to be able to continue to do business. He testified that Harper replied: "You're going to have to do whatever you need to do to supply labor at this time.[7]" Harper did not explain why she would not be able to supply the labor. Bolton spoke with his general manager, other managers, and Walston about an alternate plan for obtaining labor. Ultimately, Freeman worked out a plan to bring more labor from Atlanta, use a temporary service, or use another labor source service in Charlotte. Bolton recalled that following his telephone conversation with Harper, no further labor calls were made to Harper.

DeBord testified that toward the end of March or the first of April 2004, he saw Harper at an event at the Georgia World Congress Center in Atlanta. He stated: "You know, Johnny tells me that you're shutting the phones and faxes off up there." When Harper confirmed his statement, he responded: "So, what are we supposed to do in Charlotte?" DeBord testified that Harper replied: "Well, at this point in time we can't fill your labor calls. So, you need to do whatever it is you need to do to get your shows put in Charlotte." DeBord maintained that he asked her: "So, I'm hearing you correctly then, that we can do whatever we need to do?' She replied: "That's right." DeBord reported his conversation to Bolton.

Based upon information received from both Bolton and DeBord, Walston telephoned Harper toward the end of March 2004. Walston testified that when he questioned Harper about the Local, she responded: "I've got to be truthful with you. We can't handle the situation there in Charlotte, we are closing down. I'm pulling out the phone and the fax machine and we will not be able to fill your calls anymore." Walston asked if this action was based upon problems with specific employees. Harper explained: "No, it's really the whole group. We can't even get good phone numbers and different things like that now." Walston asserted that Harper told him that the Union could not fill the labor obligation under the contract. Walston testified that when he asked Harper if she meant that they were no longer following the contract, she replied: "Yes, don't send us any labor calls anymore, we can't fill them." He testified that Harper did not give him a time frame as to when the Union could again begin to fill the labor calls. Walston remembered that he specifically asked her if Freeman could get any grievances for doing so and she told him that Freeman would not. Walston asserted that while he had asked her to document their conversation in writing, she did not.

Walston acknowledges that following his conversation with Harper, Freeman independently contacted former members of Local 837 and asked them to work on various jobs. Freeman also contacted and used workers from other referral sources. Freeman does not deny that Harris' company is one of the sources that Freeman now uses for labor in Charlotte. Bolton testified that Freeman normally has approximately 30 to 40 trade shows in Charlotte each year and that Freeman maintained this same level of work in 2004 and 2005. March 2004 was the last time that Freeman used the Union as a labor referral source.

Harper recalled that while attending an event at the Georgia World Congress Center

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[7] On cross-examination, Bolton could not recall if Harper had used the phrase: "at this time." He also confirmed that Harper had not said that the Union was permanently unable to provide Freeman with labor or that Freeman was to refrain from coming back to the union for more labor.

in May 2004, she spoke with Walston, Mike DeBord, and Michael Bolton about a labor call for Freeman. She told them that she could not fill the labor call for five employees. She testified that she told them that the International President was going to give jurisdiction back to Local 322. While she did not get any labor calls from Freeman in June, July, or August, she received benefit fund payments and referral fees from Freeman in June, July, and August 2004. While she believed that Freeman had violated its contract, she did not file a grievance. She explained that the Union had not been able to fill a five person call and she didn't feel that she should enforce the contract against them when she was not providing them with labor.

During the latter months of 2004, Harper negotiated with Walston for a new collective bargaining contract for Atlanta. She denied that she had any conversations with Walston concerning the contract with Local 837. Walston testified that while he saw Harper after the March 2004 conversation, he had few conversations with her. He did recall a conversation that occurred at a Trustee meeting in approximately November 2004. He recalled that Harper and he discussed Harris' new company. Walston maintained that during the conversation he told Harper that Harris was trying to get Freeman to do business with him. He asserted that Harper acknowledged her awareness of Freeman's contacts with Harris.

### K. The Status of the Referral Hall in Late 2004

Harper admitted that by the summer of 2004, she believed that Shepard was either using Harris to fill its labor calls or that Shepard was directly calling Local 837's employees. Harper admitted that after May 2004, she received no other steward reports for labor calls or work performed in Charlotte. She further acknowledged that after the summer of 2004, she received no further fringe benefit contributions from Shepard for work performed in the Charlotte area. With the exception of one occasion in May 2005, she received no fringe benefit contributions from Freeman for work performed in the Charlotte area. Although she received the fringe benefits contribution in May 2005, there had been no referral by the Union for the work performed for Freeman. She acknowledged that while she knew that no referral had been made for work, she forwarded the contribution to the International and made no further inquiry of Freeman. Under the Union's agreement with both Shepard and Freeman, the employer cannot use an alternate labor source for work without first placing a labor call to the Union. Harper confirmed that by the end of 2004, she was receiving no labor calls from Shepard and Freeman and she was aware that her former assistant had set up a non-union competing service. She acknowledged that while she was aware of these circumstances, she made no attempts to get any additional information from either Shepard or Freeman. Harper testified that in June, July, and August 2004, she was aware that Shepard and Freeman were performing work and were violating the collective bargaining agreements. While she considered filing a grievance for the contract violation, she did not do so. She explained that even if she had won the grievance, the Union would have still had the same problem in providing employees to the employers.

Gearns admitted that toward the end of 2004, he became aware that both Shepard and Freeman were no longer contacting the Union for labor calls. He recalled that Harper told him that she was having increasing difficulty in retaining a work force because of the decrease in the Charlotte market. Harper admitted that she also told Gearns that Harris was operating his own referral service. At the time of their discussion, Harper was preparing a report to the Union's General Executive Board recommending the revocation of Local 837's charter. Gearns recalled that Harper mentioned that she had closed the Local's office in Charlotte and that telephone calls were forwarded to her Atlanta phone.

Harper acknowledged that around the first or second week in October 2004, she sent expulsion letters to Local 837's members. The members who failed to respond were dropped from the Local's membership.

## L. The Dissolution of Local 837

During the first week of February 2005, the Union's International President decided to dissolve Local 837. Harper and Gearns confirmed that in January 2005, the remaining members of the Local were expelled for non-payment of dues. Harper testified that at the time of the dissolution of Local 837, approximately 90% of the 837 members were also members of Local 322. Although Harper testified that she had promised to do so, she did not contact Delarber to let him know the International's decision concerning Local 837. Harper also admitted that from the end of 2004 until June 9, 2005, she did not call anyone at either Shepard or Freeman to ask why the Union was no longer receiving labor calls. Even though she had received no referral fees since August 2004, she did not visit Charlotte or call the Respondents to find out the status of the work in Charlotte. She confirmed that fall 2003 had actually been her last visit to the Charlotte area with respect to the business of the Local.

## M. The Union's Notice of Dissolution to Shepard and Freeman

On June 9, 2005, Gearns sent a letter to Richard Delarber advising him that the Union had merged Local 837 with Local 322. Gearns stated:

> In order to facilitate the transfer of bargaining rights to Local 322, we are asking the industry employers in the Charlotte area to recognize Local 322 as the successor co-bargaining agent for the Union. If you agree, then Local 322 will assume the existing agreement you have with Local 837. The International will remain co-bargaining agent in that same agreement.

Gearns requested that Shepard sign the letter agreeing that it would recognize and bargain with Local 322 as the successor to Local 837 and continue its collective bargaining agreement with Local 837 by substituting Local 322.

Delarber responded in a letter dated June 13, 2005, asserting that Shepard did not agree with Gearns letter. Delarber maintained that Shepard had never had an agreement with Local 322 and had never been instructed to negotiate with Local 322 because of a union election or because of voluntary recognition. Delarber explained that if Local 837 no longer exists, Shepard was under no obligation to give jurisdiction to any other union or local. Delarber went on to recount his previous conversations with Harper and the Local's inability to fill the referral needs for specific shows. Delarber explained that with no union or local to provide referrals for the previous year, Shepard had been forced to locate other sources of labor. Delarber maintained that Shepard upheld their end of the referral agreement until Harper confirmed that Local 837 was unable to fulfill its part of the bargaining agreement.

On July 15, 2005 both Gearns and Harper wrote to Delarber, requesting that Shepard bargain with the Union as the certified bargaining representative of employees under the Agreement. No reference was made to either Local 322 or Local 837. Only the International Union was referenced as the collective bargaining representative under the agreement. When Delarber responded in a letter dated August 11, 2005, he pointed out that there had been nothing in the Union's July 15 letter to indicate the local in which the Union was

requesting negotiations. Delarber reiterated Shepard's position that Local 837 did not exist and had not existed since mid-year 2004. He again explained that as early as March 2004, Harper had confirmed that she was unable to contact anyone with the local to fill labor calls and she had disconnected the telephone and fax line. Delarber explained that he knew of no union affiliation with any union representing the work force that Shepard had been "forced to use based on 837's demise." Delarber added that there was no information that would indicate that Local 322 or Local 837 represented their existing workforce. Delarber added that if Shepard's workforce of the last two years indicated that they wanted Local 322 to represent them, Shepard would reconsider its position.

Gearns responded to Delarber's August 11 letter on August 19, 2005. Gearns asserted that even though Local 837 was defunct, the International had also signed the collective bargaining agreement and remained the exclusive bargaining representative of employees covered by the collective bargaining agreement. Gearns also explained that the International remained responsible for filling labor calls and would do so along with Local 322. Gearns reminded Delarber that Shepard was not relieved of its obligations to recognize and to bargain with the International as the exclusive collective bargaining representative of the Company's Charlotte employees and that no International Representative had ever disavowed its representational rights or interest in the bargaining unit employees.

In a letter dated August 23, 2005, Delarber agreed that the International and their Local 837 had previously represented their workforce in Charlotte. He explained, however, that from March until the fall of 2004, Shepard had fulfilled their part of the obligations under the Union. After Harper informed Shepard that Local 837 no longer existed and she could no longer fulfill the Union's obligation to provide labor, Shepard developed and trained a cadre of labor in order to fulfill their obligations to customers and to continue operating in the Charlotte market. Delarber again explained that Shepard had never worked with Local 322. He added that Shepard did not know if their current workforce wished to be represented by the Union and he did not want to terminate their current employees and replace them with any other "group" of people. He added that "if and when" it is determined that the Union represents their workforce; he would gladly conduct his actions appropriately.

In an e-mail dated August 25, 2005, Harper told Delarber that she had been tasked by the International President "with protecting the International's representational and contractual interests in Charlotte, North Carolina." She provided the dates on which she was available to meet for negotiations. Delarber responded that apparently Gearns had not shared any of his correspondence with her concerning this issue. Delarber explained that rather than re-address the issues, he would forward copies of Shepard's position for her review.

On June 9, 2055, Gearns sent the same letter to Freeman that he had sent to Shepard with the notification that the Union had merged local 837 with Local 322. In his letter to Walston, Gearns requested that Freeman sign the letter and agree to recognize and bargain with Local 322 as successor to Local 837 and to continue the bargaining agreement in all respects with only the substitution of Local 322 for Local 837. Walston replied to the letter in an e-mail on June 17, 2005. Asking for clarification of the Local' s states, he explained that more than 12 months before, Harper told him that Local 837 was dissolved and would not longer attempt to fill Freeman's labor calls and that Freeman was free to use other labor sources. Walston explained that Freeman had considered the contract terminated at that point. He confirmed that Freeman had not worked with the Union in Charlotte since that time period and had established other contracts. He clarified that

Freeman would not agree to another Local becoming a successor or substitute.

On July 15, Gearns and Harper sent Walston a letter asserting that the International was the certified bargaining representative for the employees under the existing collective bargaining agreement and citing the contract provision for the agreement's automatic renewal on July 1. Walston was directed to Bruce Grier for any employee referrals. On August 3, 2005 Walston responded by e-mail. He stated:

> Faye:
>
> I received your letter about IATSE in Charlotte. I suppose you are now denying that you informed Freeman (around February 2004) that [that] Local 837 was closing down and to stop contacting Local 837/Johnny Harris for Charlotte labor calls. You relayed this information to me, Michael Bolton, and Michael DeBord. You proceeded to turn off the Local's phones. We were told to find another source and that we were no longer bound by a contract as you could not provide the service.
>
> We followed your instructions and there was never an issue, complaint or grievance. At the time, I asked you for a letter stating this but it was never received.
>
> How do you reconcile this turn of events with what you are proposing in the letter I received August 1, 2005?

In a responding e-mail dated August 19, 2005, Harper asserted that because Local 837 was no longer chartered, the International was the exclusive bargaining representative of employees covered in the parties' collective bargaining agreement. She further asserted that the International would continue to fill calls and that Freeman was not relieved of its obligations to recognize and bargain with the International as the exclusive collective bargaining representative of Freeman's Charlotte employees. In an e-mail response on that same day, Walston simply inquired: "According to your records, when was the last date IATSE filled a labor call for Freeman in Charlotte?" In a second e-mail to Walston on the same day, Harper proposed that Freeman began bargaining with the International for a new contract. She listed the dates that she was available to meet with him for negotiations. On cross-examination, Harper was asked if she had a position as to why she would have needed to bargain for a new contract if the prior contract was self-renewing. Harper acknowledged that she did not have an answer.

Gearns testified that neither the International nor any Union Local had ever disclaimed interest in a bargaining unit. He explained that neither an individual Local nor an International Representative would have the authority to disclaim interest in a bargaining unit. Such an action would have to be approved by the International President.

## III. Findings and Conclusions

### A. Whether the Union Represents a Majority of Respondents' Employees

Respondent argues that the Union does not represent a majority of the employees utilized by Respondents for their tradeshow work in the Charlotte area and therefore the complaint allegations are barred. In asserting this defense, Respondent relies upon the

testimony of Harris and Delarber. Harris testified that after his resignation from the Union, members told him of their dissatisfaction with the Union. Both Harris and Delarber testified that Harris told Delarber about the members' dissatisfaction. Harris also testified that only two to ten of the individuals that he refers through his referral company were former Local members and may have been previously referred through the Union's referral hall. Accordingly, Respondents argue that because Harris' company is just one of many labor sources used by Respondents in Charlotte, the former Local 837 referrals make up an "extremely small percentage" of the employers employed by Respondents.

The Respondents asserts therefore, that because they are now employing new employees who were not previously on the Local 837 referral list, the Union has lost its majority status. The Board has long held, however, that absent evidence to the contrary, new employees are presumed to support an incumbent union in the same ratio as those they replaced and in the same proportion as the previous employee complement. *Simplot Co*., 311 NLRB 572, 588 (1993); *Tube Craft, Inc*., 289 NLRB 862, 869 (1988).

Accordingly, an incumbent union is presumed to retain its majority status. In its decision in *Levitz Furniture Company of the Pacific, Inc*., 333 NLRB 717, 720 (2001), the Board specifically concluded that there are "compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or disbelief concerning the union's majority status." The Board went on to hold: "We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." The Board has also found that an employer may not merely rely upon rumors to demonstrate a good faith doubt of a union's majority status. See *Butera Finer Foods, Inc*., 343 NLRB No. 30, slip op. at 1 (2004). Any doubt as to continuing majority status must be founded on a reasonable basis and cannot depend solely on unfounded speculation or a subjective state of mind. *NLRB v. Gulfmont Hotel Co.,* 362 F.2d 588, 589 (5th Cir. 1966). Consequently, there must be reliable objective evidence. *Landmark Trucks*, 272 NLRB 675 (1984). In the instant matter, there is no evidence that the Respondents had any objective evidence that the Union had lost the support of a majority of the bargaining unit employees. In an August 23, 2005 letter to Gearns, Delarber stated: "We do not know if our current workforce wishes to be represented by IATSE."

The record evidence demonstrates no objective or reliable basis for Respondent's conclusion that the Union lost its majority status with Respondents' change in their workforce. At best, the only evidence of a loss of majority status is Harris' the hearsay account. Inasmuch as he was actively competing with the Union for referral services, he was hardly a disinterested source upon which either Respondent could rely. Accordingly, I find no merit to Respondents' argument that the Union lost its majority status.

### B. Whether the Union's Claim is Barred by the Doctrine of Equitable Estoppel

The Respondents further assert that they relied on the Union's representations to their detriment and arranged for labor from other sources. Respondents maintain that the Union knew that Respondents would rely on its representations because the Union knew that it was Respondents' primary source of labor in Charlotte. Respondents maintain that the Union also knew that the Respondents would continue to perform trade shows in Charlotte and would be in need of labor. Respondents assert that on the basis of the Union's representations, the Union was relieved of its burden of securing the workers for the Respondents.

The principal of equitable estoppel is based on the premise that a party that obtains a benefit by engaging in conduct that causes a second party to rely on the "truth of certain facts" should not be allowed to later controvert those facts to the prejudice of the second party. See *R.P.C Inc*., 311 NLRB 232 (1993). As the Board set forth in its decision in *Red Coats, Inc*. 328 NLRB 205, 206 (1996), the essential elements of equitable estoppel are: (1) knowledge, (2) intent, (3) mistaken belief, and (4) detrimental reliance. The record evidence in this case does not establish that the requisite elements of equitable estoppel have been met. While Respondents may certainly argue that they have detrimentally relied upon a mistaken belief concerning the Union's status, the evidence is lacking with respect to the requisite elements of intent. Harper acknowledged that she suspected the Respondents of violating the collective bargaining agreements. As discussed later in this decision, the evidence demonstrates that Harper had constructive knowledge that Respondents were disregarding the terms of the respective agreements. There is, however, no evidence to support a finding that the requisite intent was a factor in the Union's actions. Moreover, the record is equally silent as to any benefit that the Union derived. Respondent's assertion that the Union was relieved of its burden of securing workers for Respondents is not persuasive. While the Union may not have provided employees to the Respondents after mid-2004, the Union was equally deprived of referral fees that would have resulted from those referrals. Certainly, the bargaining unit employees were deprived of contract labor rates and the accompanying fringe benefit contributions. Accordingly, I do not find the Union's claims barred by the doctrine of equitable estoppel.

### C. Whether the Union Disclaimed Interest in Representing Respondents' Employees

Respondents assert that the Union's representations and actions constituted a disclaimer of interest. Respondents acknowledge the Board's rule, however, requiring a disclaimer to be clear and unequivocal. Respondents assert that the alleged statements of both Harper and Harris combined with the defunctness of the Local amount to a disclaimer of interest. Assuming that Harper and Harris made all of the statements attributed to them by Respondents' witnesses, a disclaimer of interest cannot be inferred. The Board has long held that a union's bare statement of disclaimer is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary. The union's conduct must not be inconsistent with its alleged disclaimer. *Sweetner Products*, 268 NLRB 1106, 1111 (1984); *International Brotherhood of Electrical Workers, AFL-CIO (Texlite Inc*. ), 119 NLRB 1792, 1798 (1958). While it appears that Harper was not actively engaged in representational activities on behalf of Local 837 after mid-2004, her actions were not consistent with a disclaimer of interest. The record reflects that in late 2004, Harper was involved in negotiations with Freeman for Freeman employees covered by the Atlanta contract. It is not disputed that after mid-2004, Harper continued to have contact with Shepard's personnel concerning other employees represented by the International. Inasmuch as Delarber contacted Harper in October 2004 to inquire as to the Union's ability to provide employees for the November 2004 event, Shepard obviously still considered the Union to be a viable representative entity.

Additionally, while Harper and other Union representatives may have shown little, if any, interest in the employees covered by the respective Charlotte collective bargaining agreements, such lack of interest is not tantamount to a valid disclaimer of interest. Thus, I do not find that the Union, through Harper or any other Union representative, clearly and unequivocally abandoned its claim for representation sufficient to constitute a valid disclaimer of interest.

### D. Whether the Union Repudiated the Collective Bargaining Agreements with Respondents

Respondents maintain that the Union repudiated the collective bargaining agreements with Respondents when it permanently discontinued the referral process in the middle of 2004. There is, however, no evidence that Harper or Gearns definitively repudiated the collective bargaining agreements as asserted. Harper does not deny that by the middle of 2004, she was unable to fill the labor calls for either Freeman or Shepard. She told them that because she could not fill their calls, they would have to use alternate labor sources. Even though Harper could not provide the requested labor in May 2004, Delarber again contacted Harper in October to inquire about the Union's ability to provide 65 employees for the large event planned for November 2004. If Delarber's testimony is credited, he obviously did not consider Harper to have repudiated the contract in the middle of 2004. Additionally, as Counsel for the General Counsel points out in her post-hearing brief, the respective contracts specifically contemplated the Union's inability to fill all calls, as each contract provided a provision for Respondents to supplement labor calls with employees from an alternate source. There was no provision requiring the Union to completely or consistently fill each and every labor call by the Respondents.

The Respondents assert that the Union repudiated the collective bargaining agreements during the middle of 2004 when it "discontinued placing any labor calls to the Respondents." Respondents cite two very early Board decisions in support of this argument. In *Kellerstone, Inc*., 206 NLRB 156 (1973), the Board found that a plant manager's statements constituted an employer's attempt to repudiate a collective bargaining agreement. This finding of an "attempt to repudiate" was considered, however, in relation to whether employees were in breach of a no-strike provision of the contract. The Respondents also argue that in *Adroit Manufacturing Co.,* 236 NLRB 1358 (1978), the Board held that because the employer failed to pay the contractually required bonus payments, there was a material breach of the agreement, allowing the union to be relieved of its obligations under the agreement. While the Board affirmed the administrative law judge in finding the employer's failure to pay production bonuses to constitute a material breach of the collective bargaining agreement, such breach was considered only in relation to whether the union was excused from striking in violation of a contractual grievance and no-strike provision. The Respondents do not cite, however, any Board precedent for the proposition that a union's failure to provide labor pursuant to a referral hall arrangement constitutes a repudiation of the contract or even a material breach of contract. Accordingly, I do not find that the Union repudiated the contracts as alleged.

### E. Whether the Complaint is Barred by the Principle of Defunctness

Respondents argue that the "Union", meaning both the Local and the International, was defunct with respect to Respondents' operations in Charlotte and thus the complaint is barred. In support of this argument, Respondent points to the Board's decision in *Hershey Chocolate Corp.,* 121 NLRB 901 (1958). In *Hershey,* the Board held that a representative is defunct if it is unable or unwilling to represent the employees. The Board noted, however, that mere inability to function does not constitute defunctness; nor is the loss of all members in the unit equivalent to defunctness if the representative otherwise continues to exist and is willing and able to represent the employees. The Board further noted that in considering defunctness, consideration should be given to the entity or entities that are signatory to the contract and are consequently in a position to secure enforcement of its terms. Respondents

argue that both contracts in issue use the term "Union" to refer to both the Local and the International. Respondents further argue that it is irrelevant that the International continued to exist after the Local became defunct or was disbanded because the International did not assume the "Union" status.

Certainly, there is little evidence that the Local or the International was involved in any representational activities on behalf of the bargaining unit employees covered by the respective collective bargaining agreements after May 2004. The only evidence of any representational conduct prior to June 2005 was the International's letter to Davis that was generated from the International President's New York office and triggered because of the scheduled termination of the Shepard contract on November 1, 2004. Thus, while neither the Local nor the International engaged in any significant representational activities or demonstrated any apparent interest in representing the employees, I also note that there is no evidence that they were called on and failed to act on the unit employees' behalf. See *Kent Corp*., 272 NLRB 735, 736 (1984), where the Board considered such evidence in finding that a Union was not defunct. Contrary to the Respondents' assertions, I do not find Harper's inability to fill Respondents labor requests as evidence of a failure to act on the employees' behalf as contemplated by the Board in *Kent.*

Accordingly, the complaint allegations are not barred by the principle of defunctness as argued by Respondents.

### F. The Agency Status of Johnny Harris

Respondents further defend their repudiation of the collective bargaining agreements on their assertion that they relied upon the statements of Harris as an agent of the Union. Respondent maintains that because Harris was an agent of the Union, several of his statements are therefore binding upon the Union and the Respondent was therefore justified in relying upon Harris' representations.

An abundance of testimony was presented by all parties concerning the agency status of Harris. While Harper acknowledges that Harris functioned as the Local's call steward for the Charlotte employees, she denies that he was authorized to act as an officer or agent of the Union. Harris testified at length about his activities on behalf of the Local and his attempts the secure work for the Local and to further the growth of the Local. Based upon his testimony, it is apparent that during the time that he was involved with the Local, he increasingly held himself out as an official of the Union. Admittedly, he wanted to become the business agent once the Local attained its autonomy. Harris's testimony reflects that he apparently devoted the same enthusiasm and commitment to growing the Local as he subsequently did with his own business. Even if there is no affirmative evidence that Harper or any other Union officer authorized Harris to represent himself as an agent of the Union, the Board has found actual authority when the principal has cloaked the individual with sufficient authority to create a perception that the individual acted on behalf the principal. *Tyson Fresh Meats*, 343 NLRB No. 129, slip op. at 4 (2004). While Harper may not have authorized Harris to take all of the actions that he did on behalf of the Union, the total record evidence reflects that Harper did little to restrict his activities or to usurp his self-generating authority. Because of Harper's physical absence and limited involvement with the Respondents and the employees, Harris was substantially the only active representative of the Union for the Charlotte employees and was arguably perceived as acting on the Union's behalf.

Despite the fact that Harris may have held himself out as an agent of the Union to the Respondents, the credible record evidence reflects that his doing so was of little significance for the issues herein. Respondent asserts that Harris told Michael DeBord in March 2004 that the Union was shutting off the phone and fax lines in Charlotte. Walston testified that it was because of that alleged conversation, that he telephoned Harper to verify the information. Thus, Respondents' own witnesses confirm that Harris' alleged statement was not accepted at face value and Freeman proceeded to speak directly with Harper concerning the matter.

Delarber also testified that he had a conversation with Harris during which Harris told him that the Union in Charlotte had "shut down" and would no longer be filling labor calls. Harris also allegedly told Delarber that the majority of the members no longer desired to be associated with the Union. Harris, however, did not corroborate this alleged conversation. Harris was specifically asked what conversations that he had with representatives from either Respondent around March 2004 and during the summer of 2004. Harris testified that sometime between April and September 2004, he had conversations with individuals from both companies "in regard to Local 837 not being able to fill calls anymore." He explained: "They were concerned wanting to know what I knew about it, which wasn't very much because Ms. Harper never called me after I sent her the phone back. I think that she may have called me one time to place me on a call and I'd already resigned." While Harris also testified that he mentioned to Shepard and Freeman that he thought that the Local was defunct, he did not identify with whom he spoke or any details of such conversations. Harris, in fact, only recalled one specific individual with whom he spoke concerning the status of the Union. He identified the individual as Michael McDonald; a close friend who was no longer employed by Shepard at the time of the conversation.

Thus, Harris' status as an agent of the Union is of little import to the issues herein. Harris' statements provided no basis upon which the Respondents could have relied in abandoning their respective collective bargaining agreements.

### G. Harper's Contact with Shepard in the Fall of 2004

It is undisputed that following May 2004, Harper had no further contact with Freeman concerning the representation or referral of employees in the Charlotte bargaining unit. Such is not the case with Shepard, however. Harper testified that in response to the International's letter to Davis in August, 2004, Delarber contacted her to discuss negotiations for the contract reopener. She contended that because she was involved in negotiations for Local 837 in Atlanta, she told Delarber that she was booked up and that she would call him again in November to touch base and to set dates for the reopener negotiations. She maintains that she called Delarber again in November and told him again that she was unable to meet because of the continuing negotiations with Local 837. She maintained that in each conversation, Delarber simply agreed without comment. By contrast, Delarber asserts that he spoke with Harper in October 2004 concerning the Union's ability to provide labor referrals for a large show scheduled in Charlotte for November. He vehemently denied that he had any conversations with Harper concerning negotiations for a new contract. In light of the total record testimony, I do not credit Harper's account of her conversations with Delarber in August and November. The conversations, as recalled by Harper, are simply not plausible. The essence of the conversations as described by Harper depicts Delarber as open and ready to begin negotiations for a new contract. I find this illogical in light of the undisputed fact that Harper had been unable to fill Shepard's labor requests in May and Shepard had ceased making referral requests. Gearns testified that employers opt to

negotiate referral hall agreements with the Union in order to have a labor pool to draw from when needed. Inasmuch as Shepard had not utilized the referral hall agreement since May 2004, there would have been no logical basis for Delarber's interest in negotiating a new collective bargaining agreement. His alleged telephone call to set up negotiations sessions is simply not reasonable and Harper's testimony concerning such conversation is not credible.

### H. Whether the Union's Charge is Barred by Section 10(b) of the Act

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filling of the charge…" In *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 419 (1960), the Supreme Court explained that this provision exists to bar litigation over "past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." The Board has specifically noted that the intended purpose of Section 10(b) is that, "in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than 6 months before." *Chemung Contracting Corporation*, 291 NLRB 773 (1988); *Koppers Co*., 163 NLRB 517 (1967). The limitations period does not begin to run, however, until the charging party has "clear and unequivocal notice", either actual or constructive, of a violation of the Act. *Leach Corp*., 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995).

Counsel for the General Counsel asserts that the Union did not have actual or constructive knowledge that the Respondents had withdrawn recognition and repudiated the collective bargaining agreements until June 2005, which was well within the six-month statute of limitations. General Counsel cites the Board's decision in *A & L Underground,*[8] in which the Board noted that the 10(b) period begins only when a party has clear and unequivocal notice of a violation of the Act. In that same decision, however, the Board also explained: "Once a party has notice of clear and unequivocal contract repudiation … a dispute is clearly drawn. Indeed, it is at the moment of that repudiation that the unfair labor practice –fundamentally occurs*…. id* at 469. In a more recent decision, the Board also explained that if the repudiation occurred outside the 10(b) period, "all subsequent failures of the respondent to honor the terms of the agreement are deemed consequences of the initial repudiation" for which recovery is barred*. St Barnabas Medical Center*, 343 NLRB No. 119, slip op. at 4 (2004). The Board contrasted such action with a situation in which a respondent has simply breached provisions of the collective bargaining agreement to a degree that rises to the level of an unlawful unilateral change in contractual terms and conditions of employment.

Counsel for the General Counsel argues that the Union did not, in fact, have actual or constructive knowledge that the Respondents repudiated the collective bargaining agreements until June 2005. The total record, evidence, however, reflects otherwise and supports a finding that the Union clearly had constructive notice that Respondents were operating nonunion in repudiation of their collective bargaining agreements.

Harper acknowledged that under the terms of the collective bargaining agreements, Respondents were required to place a labor call with the Union prior to using any outside

[8] 302 NLRB 467, 470 (1991).

source for labor. She admitted that after May 2004, the Union received no labor requests from either Shepard or Freeman. She testified that she was aware that a trade show must have occurred in June, July, or August 2004 because benefit contributions had been received. She admits that even though she received no labor calls from either Respondent after May 2004, she made no inquiry as to what trade shows were occurring in Charlotte. Harper additionally acknowledged that the Union received its last referral fees from the Respondents in June, July, and August 2004 for labor requests made prior to June 2004. She admitted that after receipt of these fees, she took no action, even though she believed that the Respondents had violated their respective collective bargaining agreement. She went on to explain that she did not file a grievance against the Respondents because she had been unable to fill their previous labor calls and she didn't want to penalize them for trying to service their clients.

Harper admitted that after May 2004, the Union received no paychecks for any labor calls from either Shepard or Freeman. Additionally, the Union received no payroll accounting reports for paychecks after May 2004. Harper also testified that after the summer of 2004, the Union received no fringe benefit contributions from Shepard for any work performed in Charlotte. Harper also acknowledged that while the Union received a fringe benefit contribution from Freeman in July 2005, there had been no referral by the Union to generate such contribution. The record reflects no credible evidence to dispute Freeman's explanation that the July 2005 contribution occurred only because of an accounting error.

Harper also admitted that in the middle of 2004, members told her that Harris had set up his own referral service and that it had "crossed her mind" that Harris was providing referrals to Shepard and Freeman. She also conceded that when she spoke with Delarber in the middle of 2004, he told her that Harris had established his own labor referral company and had offered to supply labor to Shepard if the Union could not do so. Harper acknowledged that while she had not received any labor calls after May 2004 and even though she suspected that Harris was operating a competing labor referral service and providing labor referrals to Shepard and Freeman, she neither visited nor telephoned the Respondents to inquire about the status of the work in Charlotte. She admitted that her last visit to Charlotte with respect to the business of the Local occurred in approximately fall of 2003.

While he could not provide a date, Gearns testified that he became aware that Harris was referring non-union labor to the Respondents. He confirmed that by using Harris to supply referral service on a full-time basis, Shepard and Freeman were in breach of the collective bargaining agreements. He also acknowledged that despite Respondents' breach of the collective bargaining agreements, no grievances were filed. While Harper could not recall the specific dates, she did not deny that she talked with Gearns about the status of Local 837 and Harris' competing referral service. Harris acknowledged that it was possible that her conversations with Gearns about Harris occurred before the end of 2004.

The Respondents presented a number of witnesses who testified concerning conversations with Harper in 2004 concerning the Union's inability to fill the labor calls and Respondents' ensuing release from the remaining terms of the collective bargaining agreements. While Harper acknowledges that she could not fill the labor calls from Respondents in the middle of 2004, she denies that she ever told them that they were

released from their contractual obligations. While Harper may deny[9] the specific conversations alleged by Delarber, Walston, and other Respondent witnesses, Harper's own testimony is sufficient to indicate her knowledge that the Respondents ceased to follow their respective collective bargaining agreements in the middle of 2004. Harper's undisputed testimony reflects that as of the middle of 2004, both Respondents ceased to comply with any aspects of their respective collective bargaining agreements. In the Board's recent decision in *Masco Contractors Services East*, *Inc*., 346 NLRB No. 40 (January 2006), the Board relied upon a union representative's admissions concerning the time in which he knew that the respondent was not complying with the terms of the collective bargaining agreement "in any manner." The Board found that the evidence established that the union had clear and unequivocal notice, outside the 6-month limitations period, that the respondent had totally repudiated the agreement and had not merely breached the contract's provisions. *Id*. at fn. 2. In *Phoenix Transit System*, 335 NLRB 1263, fn. 2 (2001), the Board affirmed the administrative law judge's finding that the complaint was barred by Section 10(b) of the Act. In doing so, the Board relied upon the finding that prior to the 10(b) period, the charging party was "on notice of facts that reasonably engendered suspicion" that an unfair labor practice had occurred. Specifically, the charging party admitted that he had a "gut" belief of such occurrence. Certainly, such an acknowledgement is comparable to Harper's admission that it had "crossed her mind" that Harris was providing referral services to the Respondents as well as her admitted belief that the Respondents had violated their respective collective bargaining agreements.

Even where a union does not have actual notice, it may be chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have learned much earlier of an employer's contractual noncompliance. *Moeller Bros. Body Shop, Inc*, 306 NLRB 191, 193 (1992). In *Moeller Bros*., *id*. at 193, the Board further explained that while a union is not required to police its contract aggressively in order to meet the reasonable diligence standard, "it cannot with impunity ignore an employer or unit" and then rely upon its ignorance of events to argue that it was not on notice of the employer's actions. Counsel for the General Counsel cites a number of reasons to justify Harper's failure to contact the Respondents or the members to assess contract compliance. Counsel for the General Counsel submits that the testimony of Harper, Gearns, and as well as Respondents' witnesses indicate that trade show work in Charlotte was sporadic and unpredictable. Harper also testified that it had not previously been her practice to contact employers to inquire about work. Because Harper did not live and work in Charlotte, it is indeed reasonable that she would not have had a practice of frequent contact with either Respondent or the employees in the Charlotte area under normal conditions. Additionally, during the time when Harris or other employees served as call stewards for the Local, there would have been less reason or opportunity for her to be in contact with individual members. The record reflects, however, that as of May 2004, Harper was the only Union representative responsible for filling labor requests for the employers and servicing the needs of the individual members of Local 837. It is reasonable that her contacts with the members should have increased rather than decreased. There was, however, no evidence that Harper spoke with any Local members or made any inquiry concerning the status of the work in Charlotte.

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[9] Because Harper admits that she told representatives of both Freeman and Shepard that the Union could not fill their labor requests and that they would have to obtain labor elsewhere, there is sufficient basis to conclude that she also communicated her acquiescence with their abandonment of the contract provisions. Thus, I credit the testimony of Walston, Delarber, Bolton, and Debord in that regard.

Admittedly, she was also aware that the Respondents were not complying with their contracts and she suspected that Harris was providing the labor referrals for the Respondents. Even if she had no prior practice of calling employers to inquire about the status of work, it is reasonable that her suspicions would have necessitated an inquiry or some demonstration of interest.

In the instant case, there is no allegation that the Respondents made any attempt to conceal the fact that they were not following the terms of the collective bargaining agreements. In *Mathews-Carlsen Body Works, Inc*., 325 NLRB 661, fn. 2 (1998), the Board affirmed the administrative law judge in granting the General Counsel's motion to withdraw the complaint. General Counsel sought to withdraw the complaint based upon the record evidence showing that the union would have discovered the misconduct had it exercised reasonable diligence in policing its contracts. In granting the motion, the judge found no evidence that the respondent attempted to conceal its misconduct and concluded that such misconduct should have been evident to the union upon its visit to the facility. Additionally, there was no evidence of any restrictions that would have prevented the union's talking with employees concerning the misconduct. In the instant case, had Harper spoken with the Respondents, the bargaining unit employees, or even Harris, she would certainly have confirmed her suspicions and ascertained the extent to which the Respondents had abandoned the collective bargaining agreements.

As discussed above, neither the facts of this case nor the applicable legal authority provides a lawful basis for Respondents' abandonment of their collective bargaining obligations. I find it interesting however, that both Shepard and Freeman essentially abandoned their obligations and repudiated their respective agreements at or near the same time period. They also did so after conversations with Harper about her inability to fill a requested labor call. Although Harper denies that she told the Respondents that they were free to disregard the contracts, the Respondents did just that under almost identical circumstances. What is even more remarkable is the absence of any evidence linking these two Respondents in any joint or planned course of action. The record evidence demonstrates that their only commonality is the fact that they were initially organized by the Union during the same time period. They appear to be in every other respect competitors and independent business entities. Thus, inasmuch as these Respondents acted independently, their parallel action implies that they responded to a comparable message from the Union.

The charges in this matter were filed on August 24, 2005. The total record evidence demonstrates that long before February 24, 2005, the Union had clear and unequivocal notice that the Respondent's had abandoned any adherence to the existing collective bargaining agreements. But for Freeman's July 2005 erroneous fringe benefits contribution[10] for work that was not referred through the Union, there is no evidence that either Respondent fulfilled any contractual obligations after August 2004 or took any action inconsistent[11] with

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[10] Even though the contractual contribution was made in July 2005, such action would not refute the Union's clear and unequivocal notice prior to February 24, 2005 and would not serve to revive the Union's unfair labor practice claim. *Ohio and Vicinity Regional Council of Carpenters*, 344 NLRB No. 37, slip op. at 4 (2005*); Harris v. Crown Zellerbach Corp*., 629 F. Supp. 687, 689 (E.D. Mo. 1986, affd. mem. 822 F.2d. 1092 (8th Cir. 1987).

[11] See *Bouille Clark Plumbing, Heating, and Electric, Inc*., 337 NLRB 743, 751 ((2002), Continued

total contract repudiation. Such conduct clearly equates to contract repudiation rather than merely a breach of contract provisions that could be deemed as unilateral changes in contractual terms and conditions of employment. See *Vallow Floor Coverings, Inc*., 325 NLRB 20, 20 (2001).

The complaint alleges that on or about February 24, 2005, and at all times thereafter, Shepard and Freeman refused to bargain collectively with the Union and that Freeman refused to use the Union's exclusive referral hall as provided in the parties' collective bargaining agreements. The complaint also alleges that on or about June 17, 2005, and continuing thereafter, Freeman withdrew recognition from the Union. The complaint also alleges that on or about June 13, 2005 and August 11, 2005 and continuing thereafter, Shepard withdrew recognition from the Union and failed and refused to negotiate a successor collective bargaining agreement. There is no record evidence of any conversation, event, or incident that occurred on February 24, 2005 and the specific date appears to be significant only for purposes of preserving a date within the requisite 10(b) period.

The dates for Respondents' alleged withdrawal of recognition and Shepard's alleged refusal to negotiate a successor collective bargaining agreement clearly fall within the 10(b) time frame. These actions would initially appear to be separate violations occurring at a time compatible with statutory limitations period. In light of the Board's decision in *A & L Underground*, 302 NLRB 467, fn 6, (1991), however, I find that the incidents of Respondents' alleged misconduct in June and August 2005 are also barred by Section 10(b) of the Act. In *A & L Underground*, the administrative law judge found that the union had constructive notice of the employer's total repudiation of the contract outside the 10(b) period. In affirming the judge's findings, the Board majority specifically noted that the alleged withdrawal of recognition was "part and parcel of the same event." The Board found that because the charge alleging an unlawful withdrawal of recognition was filed 8 months after the union's actual notice of the employer's repudiation, the entire complaint was barred by Section 10(b) of the Act.

The total record evidence supports a finding that the Union had clear and unequivocal notice of Respondents' non-adherence and repudiation of the respective collective bargaining agreements and that such notice was well before February 24, 2005. Accordingly, inasmuch as the Union failed to file its unfair labor practice charges prior to that time, the complaint is time-barred under Section 10(b) of the Act.

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where the Board affirmed the administrative law judge in finding that an employer did not provide clear and unequivocal notice of its intent to repudiate the agreement. The employer sent letters to the union stating that underpayment of overtime wages and benefits had been "inadvertently" made to the union. The judge reasoned that the assertion implied recognition of the validity of the agreement and a promise to obey contract terms. In *Adobe Walls, Inc.,* 305 NLRB 25 (1991), the union filed a grievance and picketed the employer. The Board found that such action could not be construed as acknowledgment of repudiation.

## Conclusions of Law

1. Freeman Decorating Company and Shepard Exposition Services, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The International Alliance of Theatrical and Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegations alleged in the complaint are barred by Section 10(b) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[12]

## ORDER

The complaint is dismissed.

Dated, Washington, D.C.

**Margaret G. Brakebusch**
**Administrative Law Judge**

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.